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No. 01-1079

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

SHEILA K. MONTGOMERY,
Petitioner,

v.

STATE OF MARYLAND et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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I. THE SOVEREIGN IMMUNITY ISSUE

The petition for certiorari demonstrated that this case presents an important question of federal law on which the circuits are in conflict. Numerous lower courts are struggling to understand the boundaries of one of the few remaining categories of cases in which private parties can sue states, namely, cases in which a state waives its immunity from suit. The circuits are in conflict as to whether a state waives its immunity if it litigates the merits of a case without properly asserting immunity. This case presents an appropriate vehicle for resolving this conflict. The case is also closely related to the pending case of *Lapides v. Board of Regents of University System of Georgia*, 122 S. Ct. 456 (2001) (No. 01-298).

Respondents hardly even defend the holding of the court of appeals on the immunity issue. Their opposition makes only two points, neither related to the merits of the issue and both incorrect. First, respondents assert that any ruling on the issue would be "academic" because of the Fourth Circuit's holding that petitioner's complaint fails to state a claim. Opposition ("Opp.") 13-14. This is plainly incorrect, because petitioner is challenging that holding as well. *See* Point II, *infra*. If petitioner prevails on both issues, she will win and this Court will reverse. So the sovereign immunity issue is not academic.

Second, respondents assert that no other case is "remotely similar" to this one. Opp. 14. This is also incorrect. As the petition demonstrated, this case presents the same issue as cases from several other circuits, including cases that conflict with it. Indeed, a recent district court opinion specifically cites this case and other cases discussed in the petition as showing that "circuits are split as to whether voluntary appearance and defense on the merits constitutes waiver of Eleventh Amendment immunity." *LensCrafters, Inc. v. Sundquist*, 2002 WL 205799, *6 n.3 (M.D. Tenn. Feb. 8 2002). This Court should grant certiorari to resolve this circuit split.

The cases involve the same situation: a state defendant has litigated a case's merits without properly asserting a defense of state sovereign immunity. They raise the same question: whether, having done so, the state may later assert the defense belatedly or whether the defense is barred. *See* Pet. 11-13.

It is true that in some other cases the state defendant's failure to make a proper assertion of its sovereign immunity took the form of failing to raise the defense at all, whereas in this case the state first raised the defense but then withdrew it. Plainly, however, raising a defense and then withdrawing it is equivalent to failing to raise the defense in the first place. The cases therefore present the same situation and the same issue.

Moreover, as the petition discussed in detail, some of the other cases conflict with the present case. *See* Pet. 13-15 (citing *Hill v. Blind Industries & Services of Maryland*, 179 F.3d 754 (9th Cir. 1999), *opinion amended*, 201 F.3d 1186 (9th Cir. 2000) and *In re SDDS, Inc.*, 225 F.3d 970 (8th Cir. 2000)). Side-by-side comparison of these cases with the present case clearly demonstrates the error of respondents' claim that the cases are not "remotely similar":

Hill and *SDDS*	*Montgomery*
State defendant litigates the merits of a case without raising the defense of sovereign immunity. *Held*, the defense is barred.	State defendant litigates the merits of a case and withdraws the defense of sovereign immunity. *Held*, the defense is *not* barred.

See Pet. 13-15. Again, raising the defense of sovereign immunity and then withdrawing it is equivalent to failing to raise the defense at all. Certainly respondents offer no reason why the latter should bar subsequent assertion of the defense but the former should not.

Indeed, if the distinction respondents raise does anything, it

only heightens the conflict between the cases. By raising the defense of sovereign immunity and then withdrawing it, respondents made clear that they did not simply forget to raise the defense. They raised the defense and then withdrew it expressly. To the extent that this is different from not raising the defense at all, the difference only cuts against respondents.

Contrary, therefore, to respondents' assertion, this case presents the same situation as other cases cited in the petition, and their holdings conflict. *See LensCrafters*, *supra*. This Court should grant certiorari to resolve the conflict.

Finally, respondents offer no adequate rebuttal to petitioner's argument that this case should, at a minimum, be held pending this Court's decision in *Lapides*, *supra*. As the petition explained, that case will likely offer important guidance on the question whether a state's actions, taken in the course of litigation, may waive the state's sovereign immunity. The case will also likely offer valuable guidance on another issue that played an important role in the Fourth Circuit's decision in the present case, namely, the relevance of the state's attorneys' claimed lack of authority, under state law, to waive sovereign immunity. As the petition noted, the Fourth Circuit's decision conflicts with decisions of other circuits on that point as well. *See* Pet. 14-15. If the Court does not grant certiorari, it should hold this petition pending its decision in *Lapides*.

II. THE PLEADING ISSUE

The petition for certiorari also demonstrated that this case presents an important issue, as to which the circuits are in conflict, regarding the proper construction of complaints under the Federal Rules of Civil Procedure. Petitioner's complaint contains plainly sufficient, general allegations that respondents failed to restore her, following her FMLA leave, to her previous job or to an equivalent job. Complaint, ¶¶ 14, 20; *see* Pet. 2-3, 21. The court of appeals incorrectly, and in conflict with

decisions from other circuits, disregarded these allegations and dismissed the complaint because the complaint's more specific allegations were, in the court's view, insufficient by themselves to state a claim. In doing so, the court violated the basic principle of notice pleading. The court of appeals also disregarded the plain dictates of Federal Rule 8(e)(2), which expressly permits complaints to contain inconsistent allegations.

A. *Swierkiewicz* Demonstrates the Error of the Fourth Circuit's Decision.

The petition for certiorari noted the then-pending case of *Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992 (2002), and suggested that this Court's decision would likely have an impact on this case. This Court decided *Swierkiewicz* on February 26, 2002, and its decision demonstrates the error of the Fourth Circuit's ruling on the pleading issue.

This Court's decision shows that a complaint that gives "fair notice of the basis for [plaintiff's] claims" is sufficient under the Federal Rules even if it is "based on conclusory allegations." *Swierkiewicz*, 122 S. Ct. at 999. That point is key here: The Fourth Circuit held that petitioner's complaint fails to allege that her current job is not equivalent to her previous job, but the complaint expressly alleges that, following petitioner's FMLA leave, the respondents "refus[ed] to reinstate [her] . . . to a position the same as or substantially equivalent to" her previous position. Complaint, ¶ 20. The Fourth Circuit simply ignored this allegation. *Swierkiewicz* shows that the allegation is sufficient even though it is conclusory.

The Fourth Circuit disregarded petitioner's general allegation and focused instead on her specific allegations. The Second Circuit acted similarly in *Swierkiewicz*. With regard to Swierkiewicz's claim of age discrimination, the Second Circuit said that the specific circumstance alleged in support of it (that

the defendant's president said he wanted to "energize" Swierkiewicz's department) was insufficient. *Swierkiewicz v. Sorema, N.A.*, 2001 WL 246077, **2 (2d Cir. 2001). This Court's reversal shows that a court may not dismiss a complaint based on the perceived insufficiency of its specific allegations when the complaint contains sufficient, general allegations.

Petitioner's complaint obviously gives the "fair notice of the basis for petitioner's claims" that *Swierkiewicz* requires. The basis is simple: petitioner claims that she took leave under the FMLA and, upon return from leave, was not restored to her previous job or to an equivalent job. Instead of asking whether petitioner gave fair notice of the basis for her claims, the Fourth Circuit incorrectly inquired whether petitioner pleaded sufficient factual details regarding the alleged differences between the two jobs. *Swierkiewicz* shows that this was error.

If this Court does not grant certiorari in this case, it should vacate the Fourth Circuit's decision and remand the case for further consideration in light of *Swierkiewicz*.

B. Respondents' Arguments on the Pleading Issue are Unavailing.

Respondents make several arguments as to the pleading issue, but none of them refutes petitioner's basic points.

1. The Allegations of Non-Equivalence: Respondents claim that the court of appeals could disregard petitioner's general allegations that her current job is not equivalent to her previous job because these allegations are merely "part of a series of contentions in the complaint (¶ 14) setting forth in detail how, in Ms. Montgomery's view, the two jobs are not the same." Opp. 13. That is incorrect. Petitioner chose to allege, in her complaint, *some* of the specific ways in which the two jobs are not the same, but there is no suggestion that the details given are the *only* differences between the two jobs, any more than Swierkiewicz's decision to allege that the president of his

company said he wanted to "energize" his department showed that that statement was Swierkiewicz's *only* evidence of his employer's motive for firing him. Petitioner's general allegation of non-equivalence, like Swierkiewicz's general allegation of motive, must therefore be accepted as true. The court of appeals could not disregard this sufficient, general allegation merely because it believed petitioner's more specific allegations did not, by themselves, state a claim.

Respondents also emphasize that petitioner lost no pay or benefits, and her job classification did not change, as the result of her transfer. That is true, but it does not defeat petitioner's allegation that her new job is not equivalent to her previous job. Two jobs are equivalent under the FMLA only if they are "virtually identical . . . in terms of pay, benefits and working conditions, including privileges, perquisites and status" and "involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. § 825.215(a). Two jobs may therefore be different for FMLA purposes even if they concededly entail the same "job title, classification, pay, and benefits." *See Cooper v. Olin Corp.*, 246 F.3d 1083, 1091 (8th Cir. 2001).

Petitioner alleged that her two jobs were not equivalent, and entailed substantially different duties, and the court of appeals incorrectly believed it could disregard these general allegations and look only to petitioner's specific allegations. This Court should grant certiorari to resolve the conflict in the circuits regarding the proper way to construe a complaint that contains both general and specific allegations. *See* Pet. 23-25.

2. Petitioner's lack of damages: Respondents correctly note that the court of appeals held that petitioner has not suffered damages that are compensable under the FMLA. However, respondents are plainly incorrect to suggest that petitioner's lack of damages could be a reason to dismiss her

entire FMLA claim, *see* Opp. 7-8, and the court of appeals did not so hold. In addition to her request for damages, petitioner sought, and still seeks, injunctive relief restoring her to her previous position. The court of appeals correctly recognized that petitioner could be entitled to such relief even if she has not suffered compensable damages. *See* Pet. App. 12a (noting that petitioner's claim for reinstatement "remain[s]" despite her lack of damages). Petitioner's lack of damages is not, therefore, a ground supporting dismissal of her FMLA claim.[1]

3. The inconsistent allegation: Respondents devote much of their opposition to their assertion that petitioner's own complaint demonstrates that she was transferred for a reason that was independent of her FMLA leave. Opp. 8-11. The short answer is that the Federal Rules of Civil Procedure expressly permit complaints to contain inconsistent allegations. *See* Pet. 25-26, 28; Fed. R. Civ. Proc. 8(e)(2).

There is a dispute as to why petitioner was transferred. It is true that Count I of the complaint asserts that petitioner was transferred because of a grievance she filed. This allegation may be inconsistent with Count II of the complaint, which is based on the FMLA, but the federal rules expressly permit such inconsistency. *See* Pet. 28. Respondents never adequately deal with this simple point.

Respondents note that the court of appeals relied on what it

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[1] Petitioner desires to assert her claim for injunctive relief against all the respondents, including the state itself. This Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996), shows that petitioner may assert this claim against the state only if she prevails on her argument that the state has waived its sovereign immunity from suit. The ruling on this point may be of considerable practical importance if petitioner ultimately wins the case, since her judgment against respondents would include attorney's fees. *See* 29 U.S.C. § 2617(a)(3). Petitioner would be in a much better position if such a judgment could be entered against the state, instead of the individual respondents, against whom it might prove uncollectible.

called the petitioner's own "summary" of her complaint. *See* Opp. 10; Pet. App. 14a. This reliance, however, adds nothing. The quotation given by the court of appeals is from a memorandum petitioner filed in the district court. The full sentence, of which the court of appeals quoted a portion, is:

> In this case, Plaintiff has alleged individual Defendants banished her to the maintenance department upon her return from FMLA leave because they wished to retaliate against her for filing a grievance and otherwise complaining of her work conditions.

Memorandum in Support of Plaintiff's Opposition to Motion to Dismiss 5. This sentence is not a "summary" of the complaint; it is simply an accurate restatement of one allegation of the complaint. It was relevant to one argument being made in the memorandum. Petitioner's complaint cannot be dismissed because it contains an inconsistent allegation as expressly permitted by Rule 8(e)(2); no more can it be dismissed because petitioner had occasion to restate that inconsistent allegation in opposing the respondents' motion to dismiss.

Respondents also make two arguments not relied upon by the court of appeals. First, respondents assert that petitioner's complaint "allege[s]" and "acknowledge[s]" that her transfer was planned prior to her leave and was "apparently the result" of concerns her managers had about her professionalism and trustworthiness. Opp. i, 8. This is a misrepresentation of the complaint. The complaint acknowledges only that managers *said* certain things to petitioner about why she was transferred. Complaint, ¶¶ 12-13. Obviously, there is a difference between acknowledging what managers *said* and accepting managers' statements as *true*.

Second, respondents note that Count II of the complaint incorporates the complaint's factual allegations by reference.

Opp. 10-11. That is true, but it adds nothing.[2] The complaint's factual section alleges that petitioner's transfer temporally followed two things: (1) her filing of a grievance, and (2) her FMLA leave. Complaint, ¶¶ 9-11. It makes no assertion as to which of these events *caused* petitioner's transfer.[3] The two counts of the complaint then, as the federal rules expressly permit, set forth two different legal theories. Count I asserts that petitioner was transferred *because* she filed a grievance and asserts a violation of the Due Process Clause; Count II asserts petitioner's FMLA claim. The federal rules permit petitioner to assert theories that rest on different and potentially inconsistent assumptions as to what really caused her transfer. As the petition noted, the use of inconsistent theories is perfectly appropriate at this early stage of the case, because at this stage the true cause of petitioner's transfer is best known to the respondents.

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[2] Respondent's assertion that the court of appeals "carefully rest[ed] its ruling" on these incorporated allegations, Opp. 11, is also entirely fanciful. As to this point, the court of appeals cited only what it called petitioner's "summary" of her complaint, considered above. *See* Pet. App. 14a.

[3] Paragraph 15 of the complaint alleges that petitioner suffered an "apparently retaliatory exile," but that assertion is consistent with either of petitioner's theories of relief.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Lapides* and then disposed of appropriately, or the judgment of the court of appeals should be vacated and the case remanded for further consideration in light of this Court's decision in *Swierkiewicz*.

Respectfully submitted,

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